

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



75-1231

To Be Argued By  
PHILIP PELTZ

B  
PAS.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No. 75-1231

MILTON NUSSEN,

Defendant-Appellant

-----X

Appeal From The United States District Court  
For the Eastern District of New York

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APPENDIX

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PHILIP PELTZ  
ATTORNEY FOR APPELLANT  
32 Court Street  
Brooklyn, New York 11201  
852-4335

CAROL MELLOR,  
On The Brief



**PAGINATION AS IN ORIGINAL COPY**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Docket No. 75-1231

-v-

MILTON NUSSEN,

Defendant-Appellant.

-----X

APPENDIX FOR APPELLANT

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**FINAL DOCKET**

74UR 684

PLATT, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: WOODFIELD
	for deft.
MILTON NUSSEN	Philip Beltz
	32 Court St., Bklyn, NY

I'd distribute Phentermine

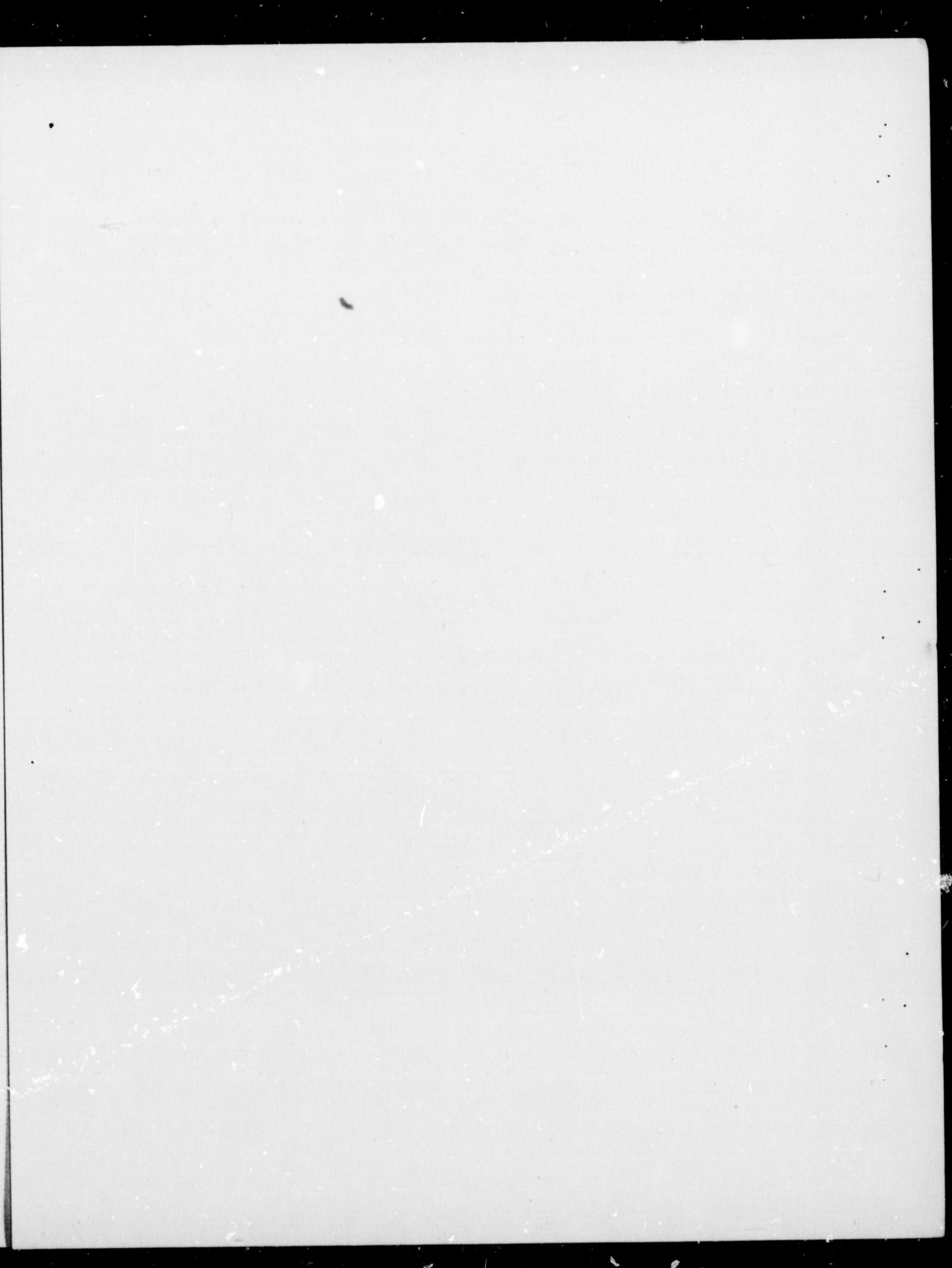
DATE	PROCEEDINGS
12/12/74	Before BARTELS, J. - Indictment filed - Bench warrant ordered
12/16/74	Bench warrant issued
12/18/74	Before PLATT, J. - Case called - Deft produced in court on bench warrant - bench warrant vacated - Deft arraigned and after being advised of his rights and the W.C.A. deft enters a plea of not guilty - bail set at \$5,000.00 P.R. Case adjd to 1/17/75 at 10:00 A.M. for status report
12/18/74	Notice of readiness for trial filed <sup>appearance</sup>
1/17/75	Before PLATT, J. - Case called - Deft and counsel present - Adj to 2/28/75
2/6/75	Magistrate's file 74M163 inserted into CR file.
2/14/75	Notice of readiness for trial filed
2/18/75	Before PLATT, J. - Case called - Deft M. Russel and counsel present - Adj to 3/21/75
3/21/75	Before Platt, J. - case called deft & counsel L. Rosenthal present

# 74CR 784

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
3-31-75	adjourned to Mar. 31, 1975 at 9:30 am for trial. Before PLATT, J - case called - adjd to 4-3-75 at 9:30 am Ready & Passed.		
4-9-75	Before PLATT, J - case called - trial ordered and BEGUN- Jurors selected and sworn - Trial contd to 4-10-75.		
4-10-75	Before PLATT, J - case called - trial resumed - Defts motion to dismiss - motion denied - trial contd to 4-14-75		
4-14-75	Before PLATT, J - case called - trial resumed - Govts motion to reopen the case - motion granted - motion to suppress begun - motion argued and denied - trial contd to 4-15-75.		
4-15-75	Before PLATT, J - case called - trial resumed - Jury resumes deliberation - Jury returns with a verdict of guilty on count 3 - not guilty on counts 1 and 2 - jury polled and jury discharged - trial concluded - sentence adjd without date.		
4-14-75	By PLATT, J - Order of sustenance filed (14 persons luncheon)		
5/30/75	Before PLATT, J. - Case called- adjd to 6/5/75 at 9:30 A.M. for sentence		
6-5-75	Before PLATT, J - case called - deft & counsel present - Philip Peltz is substituted as atty of record in place of Louis Rosenthal - Defts motion pursuant to Rule 29 for Judgment of Acquittal is denied - Defts motion pursuant to Rule 33 for a new trial argued - decision reserved - Briefs by June 12, 1975 - Sentence adjd to June 20, 1975 at 9:30 am.		
6-5-75	Consent to Change Attorney filed (received from Chambers)		
6-5-75	Notice of Appearance filed		
6-12-75	Defts Memorandum of Law filed.(received from Chambers)		
6-19-75	Govts Memorandum filed in opposition to defts motion for a new trial filed.		
6-20-75	Before PLATT, J - case called - deft & counsel P.Peltz present - motion for a new trial is denied - deft sentenced on count 3 for treatment and supervision pursuant to 18:5010(b) until discharged by the Federal Youth Corrections Division of the Board of Parole as provided in 18, U.S.C. Sec. 5017(c)		
6-20-75	Judgment & Commitment filed - certified copies to Marshal.		
6-20-75	Notice of Appeal filed		
6-20-75	Docket entries and duplicate of Notice mailed to the Court of Appeals		
7/1/75	Deft's request to charge filed		
7/1/75	Bench warrant retrd and filed- executed		
7-2-75	Order received from the C of A that the Record be docketed on or before Aug. 15, 1975		

DATE	PROCEEDINGS
7/8/75	Record on appeal certified and mailed to court of appeals
7/11/75	Acknowledgment received from court of appeals for receipt of record
8-11-75	6 stenographers transcripts filed, dated April 9, 1975; April 10, April 15, June 3, June 5 and June 20, 1975 respectively.
8-11-75	Voucher for Expert Services filed.
8-11-75	Supplemental Index to Record on appeal filed and forwarded to the Court of Appeals.
8-14-75	Acknowledgment received from the Court of Appeals for receipt of Supplemental Index to Record on Appeal.
9-25-75	2nd supplemental index to record on appeal forwarded to the Court of Appeals.
9-25-75	Stenographers transcript filed dated 4-14-75

3-a



RJD:GAW:mt  
F. # 743,568

1/17/75

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

MILTON NUSSEN,

Defendant.

Cr. No. 74CC784  
(T.21, U.S.C., §841(a)(1),  
§846, T. 18, U.S.C., §2)

December 16, 1974

----- X  
THE GRAND JURY CHARGES:

COUNT ONE

On or about the 16th day of July 1974, within the  
Eastern District of New York, the defendant MILTON NUSSEN knowingly  
and intentionally did possess with intent to distribute approxi-  
mately Eleven Thousand (11,000) tablets of Phentermine, a Schedule  
III controlled substance. (Title 21, United States Code, Section  
841(a)(1) and Title 18, United States Code, Section 2). 44  
0350

COUNT TWO

On or about the 16th day of July 1974, within the Eastern District of New York, the defendant MILTON NUSSEN did knowingly and intentionally distribute approximately Eleven Thousand (11,000) tablets of Phentermine, a Schedule III controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2).

COUNT THREE

On or about and between the 1st day of July 1974 and the 16th day of July 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendant MILTON NUSSEN, and Jerome Howard Rudish and Mark Anthony Risucci, named herein as co-conspirators but not as co-defendants, did knowingly and intentionally conspire to commit offenses against the United States in violation of Title 21, United States Code, Section 841(a)(1), by conspiring to knowingly and intentionally possess with intent to distribute and to distribute a quantity (Title 21 of Phentermine, a Schedule III controlled substance.

4-a/a

- 2 -

United States Code, Section 846.)

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendant MILTON NUSSEN and the co-conspirators Jerome Howard Rudish and Mark Anthony Risucci committed the following:

O V E R T   A C T S

1. On or about the 14th day of July 1974, at 1016 East 86th Street, Brooklyn, New York, the defendant MILTON NUSSEN delivered approximately Eight (8) tablets of Phentermine to the co-conspirator Jerome Howard Rudish.
2. On or about the 15th day of July 1974, the defendant MILTON NUSSEN and the co-conspirator Jerome Howard Rudish had a conversation concerning the distribution of approximately Eleven Thousand (11,000) tablets of Phentermine. 5a

3. On or about the 16th day of July 1974, the defendant MILTON NUSSEN placed approximately Eleven Thousand (11,000) tablets of Phentermine into a 1970 Plymouth, New York registration 797 QYP and drove this automobile to a parking lot at the intersection of Rockaway Parkway and Seaview Avenue, Brooklyn, New York.

4. On or about the 16th day of July 1974, the co-conspirator Jerome Howard Rudish procured the aforementioned Eleven Thousand (11,000) tablets of Phentermine, and, together with the co-conspirator Mark Anthony Risucci, attempted to sell the aforesaid Phentermine to a person who, unknown to them, was acting in an undercover capacity as a Special Agent for the Drug Enforcement Administration.

A TRUE BILL.

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FOREMAN

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UNITED STATES ATTORNEY  
Eastern District of New York

5-a-a

4-14-75

8

4 MR. WOODFIELD: Excuse me, your Honor, I did  
5 serve a subpoena, I had a subpoena served on Mr.  
Romanelli. Is he here today?

7 MR. ROSENTHAL: He's in the witness room and so is Mrs. Romanelli.

MP. WOODFIELD: Also served with a subpoena.

But if we have the evidentiary hearing first --

11 THE COURT: Tell the Jury that we'll be a  
12 few minutes and for them to relax. We'll be with  
them shortly.

14 THE COURT CLERK: One letter marked for  
15 identification as Government's Exhibit 7 for  
identification.

17 MR. WOODFIELD: Your Honor, the Government  
calls Agent John Digravio.

19 J O H N . D\_I G R A V I O, called as a witness, was duly  
sworn according to law and testified as follows:

**DIRECT EXAMINATION**

BY MR. WOODFIELD:

22 Q Agent Digravio, you testified the other day  
23 concerning your involvement of Milton Nussen; is that  
24 correct?

6-a

4/14/75

9

1 A Yes, I did.

2  
3 Q At that time you testified, I believe at the  
4 time of Milton Nussen's arrest you advised him of his  
5 constitutional rights that you read to us from a card that is  
6 marked Government Exhibit No. 5 in evidence; is that correct?

7 A That's correct.

8 Q At that time you also advised us that Milton  
9 Nussen stated at each one of the conclusions of the statements  
10 that you read to him that he understood his rights; is that  
11 correct?

12 A Yes.

13 Q And at that time, you then proceeded to your  
14 office; is that correct?

15 A Yes, it is.

16 Q When you arrived at your office Mr. Nussen  
17 was processed; is that correct?

18 A Yes.

19 Q From that point on you had a conversation with  
20 Milton Nussen?

21 A I did.

22 Q You testified previously to this; is that  
23 correct?

24 A That's correct.

25 Q Now, again, prior to this conversation he was

7-a

4/14/75

10

again, Mr. Nussen, was again advised of his rights; is that correct?

A He was.

Q Now, you testified the other day about certain statements Mr. Nussen made, certain statements; do you recall that?

A Yes, I do.

Q Now, sir, were there any additional statements made by Milton Nussen at the time of his arrest on December 17, 1974, that you didn't advise us of the other day?

A Yes, there were.

Q Will you please tell us the circumstances and how these statements arose?

A During the processing of Milton Nussen as I stated the other day, he made certain admissions which I mentioned. Then, there came a time during the processing after he had already stated that he wanted to cooperate with the United States Government, he became a little hesitant as most defendants do wanting to know that we weren't going to build a larger case on him and whether what he was going to say would put him in more jeopardy than he was already in.

I assured him that we weren't interested in his cooperation to further this case and to get to the source of the 11,000 stimulant tablets and that we were not

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Degravio - Direct

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now interested in any of his past conduct. We were at this point, moving on to the next potential defendant. At that time, I shook hands with Milton Nussen in a gesture that we were not working on him as a defendant, but at this time moving ahead, attempting to break the case to the next higher stage.

Q Did you discuss with Milton Nussen what in fact cooperation was?

A I informed him it was very important. The relationship he now had with the source of the 11,000 stimulant tablets because we were going to have to buy another buy. Either Milton Nussen was going to have to bring in an undercover agent or at least there would have to be a buy made by Mr. Nussen. At this time, Milton Nussen told me, Milton Nussen told me there would be no problem with his getting another purchase from the individual that was in upstate New York by the name of "Jimmy Abrahms."

Q At this time, is it not true that Mr. Nussen --

MR. PELTZ: Your Honor, could we have less leading and more testimony from the witness?

THE COURT: Yes.

Q Was there any conversation concerning Mr. Nussen's cooperation?

A Yes, there was. We told Mr. Nussen that we

9-a

2 couldn't promise him anything and that if anybody did  
3 promise him anything, anywhere along his legal process, that  
4 he should be very cautious. That we weren't making any  
5 promises, nobody could make any promises.

6 The most that we would do, would be that at  
7 the time of sentencing, we would inform the Assistant  
8 United States Attorney of the results of the cooperation and  
9 who would make it known to the Judge. Milton Nussen gave no  
10 indication that he was hesitant in cooperating with us. We  
11 basically, briefly went over, we basically -- I went over  
12 the actual events of the night of July 16 and --

13 THE COURT: Wait a minute, now. You say  
14 "basically went over the events." Tell us what was  
15 said.

16 Q Tell us what was said.

17 A At this time, we did not attempt to take a  
18 formal written statement of the events that occurred on  
19 July 16, 1974.

20 THE COURT: What was said?

21 A To begin with, Milton Nussen stated that he  
22 first had considered developing an alibi and we told him  
23 that the car, we had already determined that the car was  
24 reported stolen by him and that it would not work. Then,  
25 he went on to state that he had considered the idea of having

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a femal testify on his behalf that she was with him during the night of July 16, 1974. And, I told him that it was very unusual that someone would attempt to report a car stolen and then, at the same time, try and find a female who would say she was with him on the entire evening.

I said that under cross-examination the female may tell the entire story, and he said that no, this particular female was an actress that she would do what was expected of her. From that point, we moved on and we discussed the actual idea of developing the case further. We had made arrangements that after Milton Nussen had returned to his job, returned to his home, after several days we would continue the investigation. Also, we discussed the actual night of July 16th. Not to the point of taking it down on paper, but just to go over in our own mind and we questioned Milton Nussen as to the location, the location of Mr. Nussen as to when the actual arrest went down. And Mr. Nussen stated that he did observe the arrest go down and that under those circumstances, he led up to the actual reporting of the car stolen. That as we stated earlier, before, the second conversation on the original conversation during his processing that he felt as now, if the car was stolen then, he would not be credited with being the driver of it on that evening.

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Q Did you have any conversation with him concerning his car's presence in the parking lot?

A The actual conversation as to whether he actually drove it to the parking lot or not, no. I don't believe so. He never came out and said directly or we never asked him if he actually drove it to the parking lot that evening. We did discuss the source of the 11,000 tablets and whether he could introduce an agent or make another purchase himself, and if he was at the actual shopping center on the evening when the transaction took place. But I don't believe I specifically asked him, did you drive the vehicle there?

I did ask him if he was there, which he acknowledged and I asked him if he was the --

MR. PELTZ: Objection, your Honor. That he "acknowledged" is a conclusion.

A I asked him if they were his 11,000 pills and he said they were. I asked him if he knew the source and he stated the name "Jimmy Abrahms."

I asked him if he could initiate a further investigation and he stated that he could. There would be no problem.

Q Now, who, if anyone else, was with you during the time these statements were made?

120

1 Degravio - Direct

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2 A Special Agent John Falvee.

3 Q Over what period of time would you say this  
4 conversation took place?

5 A This particular part of the conversation?

6 Q Yes.

7 A Very short time. Approximately 5 or 10 minutes.

8 Q And did there ever come a time when you reduced  
9 this statement to a report?

10 A No, I never did.

11 MR. WOODFIELD: I have no further questions,  
12 your Honor.

13 MR. PELTZ: Your Honor, at this point I'd like  
14 to call for any further 3500 material or any other  
15 material which the defendant may be entitled to under  
16 Brady, with regard to this witness or the entire  
17 case if he has anything.

18 MR. WOODFIELD: I have none.

19 CROSS-EXAMINATION

20 BY MR. PELTZ:

21 Q Mr. Digravio, were you testifying entirely  
22 from memory right now?

23 A Yes sir.

24 Q Did you refer to anything in the past to  
25 refresh your recollection as to what you just testified to?

13a

1

Degravio - Cross

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2 A I had nothing to refresh my memory with,  
3 your Honor.

4 Q What time did the conversations you just  
5 testified to take place?

6 A What time?

7 Q That is the question.

8 A Approximately 4:30 p.m.

9 Q On what date, sir?

10 A December 17, 1974.

11 Q How long did this entire conversation take?

12 A The conversation I just testified to?

13 Q Yes, sir.

14 A 10 minutes at the most.

15 Q Sir?

16 A 10 minutes at the most.

17 Q You have a pencil and paper available?

18 A Do I have it available?

19 Q Did you during that 10 minutes have pencil  
20 and paper available?

21 A I had a pen available, I don't recall if there  
22 was -- no paper available, no.

23 Q Where were you?

24 A I was in the Long Island District Office on  
25 Long Island.

Degravio - cross

4 | 14 | 2, 17

2 Q Of the United States Drug Enforcement Admini-  
3 stration?

4 A Yes.

5 Q Do you have a desk there?

6 A I have a desk, yes.

Q Were you in the same room where your desk was?

8 A No, sir.

9 Q And how far were you from the door?

10 A 50, 75 feet.

11 Q Did you have paper in your desk?

12 A I believe I did, yes.

Q Did you from that date to today do anything

14 whatsoever to memorize the conversation you just testified to?

15 A I attempted to.

16 Q How?

A By making a case on the next person up, a

18 Mr. Abrahms.

19 Q

20 A Yes, I did.

21 || Q Where?

22 A On Mil

This was taken from him at the time of his arrest. We will

24 down the source of supply if we are informed of it.

On Mr. Nussen's 202 I wrote down "Jimmy

Abrahms" as the -- Mr. Nussen was arrested for facilitating

1 Degravio - cross

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2 the deliveries of --

3 MR. PELTZ: I call for the production of such  
4 documents.

5 THE COURT: Is it here in Court?

6 THE WITNESS: I may have it. If I can check  
7 the case file. I have it, your Honor.

8 THE COURT: You want to separate it from the  
9 file and give him a copy?

10 MR. PELTZ: As your Honor knows, I came into  
11 this case literally as well as figuratively on the  
12 eve of this trial. I see a rather substantial folder  
13 here. The agent has removed the report from it. IF  
14 this has not already been made available to the  
15 defense counsel, I would request that either it be  
16 made available to use or that your Honor review it  
17 to determine what if anything in it should be avail-  
18 able to defense counsel. I don't think this -- and  
19 I think your Honor would agree - this decision would  
20 be made by the Government as to what --

21 THE COURT: What is this file you just took  
22 this from?

23 THE WITNESS: This is the actual official  
24 file that was initiated with the case on Mike Risucci  
25 and is still an on-going investigation. It is a

1 Degravio - cross

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2 personal file of the Drug Enforcement Administration.

3 THE COURT: Are there any other documents  
4 pertaining to this defendant in that file?

5 THE WITNESS: All of the reports that were  
6 written have been turned over the Assistant United  
7 States Attorney .

8 THE COURT: Have they all been turned over to  
9 defense counsel?

10 MR. WOODFIELD: Yes, they have, your Honor.

11 THE COURT: Go ahead with your questioning.

12 We are not going to delay the case for that reason .

13 MR. PELTZ: May I see the form in question  
14 with the Court's permission?

15 THE COURT: Do you have any objection?

16 MR. WOODFIELD: No, your Honor. Would you  
17 mark it, please.

18 THE COURT CLERK: One document marked for  
19 identification as Defendant Exhibit C.

20 Q Mr. Digravio, when was your D.E.A. Form 202  
21 prepared?

22 A It was prepared at the processing of Mr.  
23 Nussen.

24 Q And was it also completed at the processing  
25 of Mr. Nussen?

17a

1

Degravio - cross

4/14/75 20

2

A No . It's a continuing form. I mean, there's  
3 an arraignment section on the back, which was completed at  
4 the time of his arraignment. It states certain facts of  
5 the arraignment.

6

Q This is the first time you ever heard of  
7 "Abrahms"?

8

A Is it? No.

9

Q Wasn't this name known to you through Rudish?

10

A Rudish? Yes, I was made aware of the name by  
11 Mr. Rudish.

12

Q Were you told he was the source of the supply,  
13 right?

14

A I was told Mr. Rudish, there was a good possi-  
15 bility, Jimmy Abrahms was the supplier of the 11,000 tablets,  
16 yes, sir.

17

Q Did you have Mr. Nussen execute any consent?

18

A Did he sign a consent?

19

Q Yes, sir.

20

A No. He just gave a verbal consent stating that  
21 he wanted to cooperate.

22

Q Did you have available to you at your office  
23 a form indicating that you had advised Mr. Nussen of his  
24 rights?

25

A There is the Drug Enforcement Administration

1 form to that effect.

2 Q . Did you offer one to Mr. Nussen for his  
3 signature?

4 A I never make use of the form.

5 Q You never make use of the form?

6 A No.

7 Q Sir, there is a D.E.A. manual?

8 A Yes, there is .

9 Q Are you acquainted with that manual?

10 A Yes, I am.

11 Q Do you have one available?

12 A No, I do not.

13 Q Does not that manual require that whenever  
14 you get a consent or whenever you advise a subject of his  
15 rights that you get a signed acknowledgment of the advice  
16 of the rights?

17 A There is no requirement to that effect.

18 Q What is the procedure set forth in that  
19 manual?

20 A That you advise the defendant of his constitu-  
21 tional rights.

22 Q Is reference made to the form wherein: A  
23 suspect or prisoner acknowledges that he was made aware of  
24 his rights?

4/14/75

22

A There is a form to that effect and there is a  
form to have him sign that he consents to give a statement  
or he consents to have a search made. If, under the feeling  
of the agent he feels it is necessary or that it may be  
necessary, he can have the defendant sign it. But in this  
situation there was no indication that it would be neces-  
sary to have Mr. Nussen sign a consent.

Q There was nothing that made it necessary for  
him?

A There was nothing at the time.

Q As a matter of fact, doesn't that consent  
indicate that the party signing it knows that anything he  
says will be used against him?

A I imagine it does, yes.

Q And how did you omit to tell us what took place  
at or about the time you shook hands with Mr. Nussen?

A Did I fail to mention it?

Q Yes, sir.

A If I did, I will mention it now. If you bring  
it out.

Q Will you tell us, please, what was said at the  
time of that hand-shaking?

A At the time of the hand-shake it was agreed  
that we were at this time attempting to begin a case on the

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source of the supply of the 11,000 pills. That we were, were not interested in what Milton Nussen had done in the past on other incidents of drug-dealings, what he said would not be used against him.

Q That what he said "would not be used against him"?

A That is correct.

Q As a matter of fact, isn't that why you couldn't have him sign a consent form, sir?

A No.

Q What is there in the D.E.A. manual with regard to taking statements or confessions from prisoners?

A What does the manual state as to that effect?

Q Yes, sir.

A It states that if you take a statement there are to be three sections; preamble, the statement and the closing.

Q Did you ever prepare such a statement as required by your manual with regard to Milton Nussen?

A It is not required by our manual.

Q When was the last time you looked at your D.E.A. manual?

A Probably a couple of weeks.

Q Do you have one available?

21a

4/14/75

24

1           A       I told you, no, I do not.

2           Q       I show you a 4-page form, which I would request  
3                   to have marked as Defendant D for identification.

4                   THE CLERK: So marked .

5           Q       I ask you, sir, if you prepared that form or  
6                   cause it to be prepared?

7           A       I was a part of the preparation of this form.

8           Q       Was anyone else a part of it?

9           A       Yes, there were.

10          Q       Who else?

11          A       Detective John Colbe, Suffolk County, Special  
12                   Agent John Falvee, Drug Enforcement Administration and  
13                   Special Agent Philip Edward, Drug Enforcement Administration,  
14                   Detective Thomas McCabe, Suffolk County Police Department.  
15                   There was also Special Investigator John Cutty, Nassau  
16                   County District Attorney's office and that's all.

17          Q       When was Defendant's D for identification  
18                   prepared?

19          A       May I see that again, please. July 22, 1974.

20                   MR. PELTZ: Your Honor, may I just take a  
21                   half a minute.

22          Q       Did you have occasion, sir, during the past  
23                   three days to visit the home of Mr. and Mrs. Romanelli?

24          A       I did.

22 a

1 Degravio - cross

4/14/75 25

2 MR. WOODFIELD: Objection . I don't see how  
3 this is relevant.

4 MR. PELTZ: Subject to connection, may it  
5 please the Court.

6 THE COURT: If it has something to do with the  
7 voluntariness of the confession.

8 MR. PELTZ: It has something to do with the  
9 veracity of this witness on the issue.

10 THE COURT: Has something to do with the  
11 voluntariness of the confession?

12 MR. PELTZ: Only indirectly.

13 THE COURT: I'll sustain it. We'll be here all  
14 afternoon if you are going to start in on extraneous  
15 issues and we have a jury waiting for this.

16 MR. PELTZ: Your Honor, this --

17 THE COURT: You are not going to have a pre-  
18 trial discovery . What the Government is doing in  
19 this proceeding --

20 Q Mr. Digravio, do you have a copy of the D.E.A.  
21 relative to which you prepared to Mr. Nussen?

22 A I believe there is one in the file, yes.

23 MR. PELTZ: I'd like to have -- I would like  
24 to have page 1 marked Defendant E for identification  
25 and page 2 marked Defendant F for identification.

230

1

Digravio - cross

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2

THE COURT CLERK: Marked for identification

3

Defendant E and Defendant F.

4

Q I show you Defendant Exhibit E and F for identification and I ask you to please identify those for the Court.

7

A This is the report of the investigation done on Milton Nussen at the time of his arrest on December 17, 1974.

10

Q Is that the only record made with regard to the arrest and questioning of this defendant?

12

A This particular arrest, yes.

13

Q Well, what other arrest or record have you made?

15

A This is the arrest report of the arrest of Milton Nussen for December 17, 1974; wherein, on December 17, 1974, on that particular day that particular transaction; this is the only report that was written.

19

Q It was written after the conversation which you just testified to, wasn't it?

21

A Of course.

22

Q Is there any mention in that report of the conversation you testified to?

24

A No, there is not.

25

Q Have you any other record made with regard to

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1                   Abrahms?

3                   A         No. The case never developed any further.

4                   Q         Did you ask Nussen where Abrahms could be found?

5                   A         He told me that he knew where Abrahms was and  
6                   that he could locate him and that he did, and I also asked  
7                   him now that you have refreshed my memory, I asked him how  
8                   he came to meet Mr. Abrahms.

9                   Q         Yes, sir. Please tell us everything.

10                  A         He told me that he knew Mr. Abrahms from the  
11                  Concord Hotel in upstate New York. That he had met Mr.  
12                  Abrahms one summer when he had worked up there.13                  Q         As a matter of fact, Jerome Rudish, also told  
14                  you that?

15                  A         No. Not exactly that entire statement, no.

16                  Q         Didn't Rudish tell you he had met Abrahms at  
17                  the Concord Hotel?18                  A         He stated that he had met Abrahms in a trailer  
19                  in upstate New York.20                  THE COURT: I have a few questions for the  
21                  witness.

22                  THE WITNESS: Yes, sir.

23                  THE COURT: This conversation that you had with  
24                  him, was on July 16 or 17?

25                  THE WITNESS: Excuse me, your Honor, it was on

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2 July 16, the afternoon of his arrest.

3 THE COURT: The transaction occurred on the --

4 MR. WOODFIELD: December.

5 THE WITNESS: Excuse me, your Honor, I am  
6 getting confused myself. The transaction took place  
7 on July 16, 1974. The arrest was December 17, 1974,  
8 and on the afternoon of the arrest, while processing  
9 him the conversation took place.

10 THE COURT: And then, was there a period of  
11 time, I think you said he went home for about a week  
12 before he was to come back and pinpoint Mr. Abrahms  
13 for you.

14 THE WITNESS: Well, there wasn't a specific set  
15 time, but we usually let a few days go by and then we  
16 have the individual recontact us and then, we initiate  
17 a subsequent investigation.

18 THE COURT: Did you recontact him or did he  
19 recontact you?

20 THE WITNESS: No. There was no further contact.

21 THE COURT: Was there any attempt made?

22 THE WITNESS: There was an indication that the  
23 defendant would cooperate if we let him plead to a  
24 misdemeanor as long as we wanted him to plead to a  
25 felony count of the indictment, there would be no

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cooperation.

THE COURT: Is that what he said?

THE WITNESS: No. That is not exactly what he said to those words, but the inference I drew the inference I'm sure I made it known to the United States Attorney that that's the way it stood. I am positive I made it known to the Assistant United States Attorney.

THE COURT: Was he supposed to call you after a week? How did you leave it with him?

THE WITNESS: We left it with that; he was to contact us. I left him my name and telephone number. Also, the Special Agent who was with me. We leave them with the 24-hour a day number and the work-day number. And then, he was to contact us. I did have reason to believe that he would contact us and when he did not contact us, I couldn't imagine what happened and you don't press the issue.

THE COURT: You didn't press?

THE WITNESS: I did not press the issue. But I did have a conversation with Mr. Nussen's boss on the evening of his arrest. I had reason to go by Kobowsky's Real Estate Corporation. At that time, I did have conversation with Mr. Abraham Kobowsky

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1 and he stated --  
2

3 THE COURT: I don't want to know what he stated  
4 at that time. That's where the inference was drawn  
5 of the A misdemeanor or felony count.

6 MR. PELETZ: Excuse me, your Honor, if I may  
7 interrupt you.

8 Could we find out if Mr. Nussen was present at  
9 that conversation?

10 THE COURT: Mr. Podowsky, he said he was not.  
11 I am not going to pay any attention to that, it's  
12 hearsay. Let me ask you one other thing.

13 When you said, as I believe you said on cross-  
14 examination at one point that the statements that he  
15 made, the further statements that he made were not  
16 going to be used against him. Was that made in the  
17 context "not going to be used against him" in this  
18 case or "not going to be used against him" in building  
19 a larger case as you heretofore indicated?

20 THE WITNESS: I meant it that what he said in --

21 THE COURT: Not what you meant in, what context  
22 as the statement.

23 THE WITNESS: The context was made that what  
24 he said would not be used against him to develop an  
25 entire case or a larger case. It would not be used

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2 to drag in other narcotic transactions or other types  
3 of incidents that had occurred.

4 What we needed from him was assurances that he  
5 in fact could help us to further this case to get to  
6 the source of supply.

7 THE COURT: It was made in that context?

8 THE WITNESS: That context. I was assured he  
9 wanted to cooperate. There was no question of a  
10 trial. I mean there was no question of having him  
11 sign a consent that he had agreed to cooperate.

12 THE COURT: That's your motion?

13 MR. PELTZ: Your Honor, I have another question.

14 THE COURT: All right.

15 CONTINUED CROSS-EXAMINATION

16 BY MR. PELTZ:

17 Q After this conversation, where you say there  
18 was no question of a trial, you do go to Podowsky Real Estate;  
19 is that right?

20 A Yes, I did.

21 Q And did you not seize records and diaries  
22 relating to this defendant's activities and employment?

23 A After his arrest?

24 Q Yes sir.

25 A I would say at the time of his arrest on

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2                   December 17, 1974.

3                   Q         You just told Judge Platt what you claimed the  
4                   context of the statement was. That it would not be used to  
5                   tighten the existing case against this defendant; is that  
6                   correct?

7                   A         I also stated more than that. I said to  
8                   enlarge, to entrap the individual, where he felt as though  
9                   we were still working on him. We were no longer working on  
10                  Milton Nussen.

11                  Q         Did you tell that to Mr. Nussen?

12                  A         I most certainly did tell Mr. Nussen we were  
13                  moving on and we wanted Mr. Abrahms. We wanted the source  
14                  and could he help us. I wanted to explain to Mr. Nussen, I  
15                  wanted to explain to him to have him feel assured that we  
16                  were not at this time interested in if he did 15 drug deals,  
17                  if he did only one drug deal.

18                  Q         Tell us, please, what you told Milton Nussen  
19                  to convey to him when you said that nothing he said would  
20                  be used against him. That this wouldn't be used to tighten  
21                  up this case against him?

22                  A         I do not remember my exact words, but to the  
23                  best of my recollection what I said to Mr. Nussen was an  
24                  exchange of conversation as I recall it Mr. Nussen was upset  
25                  that possibly we were only questioning him to build a bigger

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1 case on him. I assured --  
2

3 Q At which time did he refuse to give you any  
4 answers?  
5

6 A This was after he had agreed that we would  
7 confer with the whole incident. But it was a -- a process  
8 of convincing him that we were legitimately interested in  
9 furthering the case and not just burying him where we had him.  
10

11 Q And you let him know that? What he told you  
12 would not be used to bury him; is that right, sir?  
13

14 A I let him know that whatever he related to us  
15 in reference to Jimmy Abrahms or any other drug deals would  
16 not be used against him.  
17

18 Q But then, you questioned him about the instant  
19 drug transaction?  
20

21 A I couldn't say. We questioned him and it was  
22 a conversation.  
23

24 Q A conversation. Which ensued after your repre-  
25 sentation to the defendant that what he said would not be  
used against him; is that right, sir?

26 A We were all friends at the time. It seemed  
27 like there was nothing wrong with it.  
28

29 Q It seemed to you like there was nothing wrong  
30 with it.  
31

32 A It seemed like there would be no issue made of  
33

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34

2 it. I certainly believed there was no issue ever brought up  
3 this.

<sup>4</sup> Q Do you know how it seemed to Mr. Nussen?

5           A         He was very upset that he had been arrested.  
6  
7           He claimed that he was very sorry and that he had ever gotten  
8           involved in it and we were going to attempt to further the  
9           investigation and we promised him that the results of his  
10          cooperation would be known, made to the United States Assistant  
11          Attorney.

He seemed confident that we would follow up on  
that promise.

13 MR. PELTZ: I have nothing else of this witness.

14 MR. WOODFIELD: I have nothing further, your  
15 Honor.

16 THE COURT: All right, you may step down.

17 (The witness is excused.)

18 MR. PELTZ: At this time, sir, I would  
19 respectfully move and urge that your Honor suppress  
20 from the introduction into evidence any statements  
21 which have been testified to now for the very basic  
22 reasons that; a, the defendant not having testified  
23 they cannot properly be used to impeach his veracity  
24 of his testimony; that they cannot be used to suggest  
25 that he is perjuring himself in that he has not testified

32 a

1 and furthermore, there certainly would be a few  
2 processed violations at this time in the use of any  
3 statements which were made by a defendant whether  
4 confused, frightened, young or not, after an explicit  
5 representation that such statements would not be used  
6 against him .

7 THE COURT: The motion is denied.

8 MR. PELTZ: We respectfully accept.

9 THE COURT: All right. Are you ready to  
10 proceed?

11 MR. WOODFIELD: I understand the witness I  
12 want to call is in the witness room.

13 MR. ROSENTHAL: Your Honor, may we have a two  
14 minute recess. Defendant would like to attend the  
15 men's room.

16 THE COURT: We have a long day ahead of us,  
17 gentlemen. If we're going to get through today --  
18 all right. But let's go quickly.

19 (Recess is taken at 11:03 a.m.)

20 (Return from recess at 11:07 a.m.)

21 THE COURT: All right. Let's bring the Jury in.

22 (The Jury enters the courtroom at 11:08 a.m.)

23 THE COURT: Good morning, ladies and gentlemen.  
24 I am sorry about the delay, we have had a legal  
25 hearing on various legal questions which I'm not at

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1 THE CLERK: U.S.A. v Milton Harold Nussen for  
2 sentencing.

3 MR. WOODFIELD: Gary Woodfield for the Govern-  
4 ment.

5 MR. PELTZ: Philip Peltz, 32 Court Street for  
6 the defendant. Your Honor, I am going to submit to  
7 your Honor a stipulation for substitution of attorney,  
8 a change of attorney which has been executed by the  
9 defendant. With your Honor's permission I would like  
10 to submit it.

11 MR. WOODFIELD: Your Honor, I am just looking  
12 at the pre-sentence report. The Court allowed me to  
13 glance at it.

14 THE CLERK: Does the defendant have any objec-  
15 tion to the substitution of counsel?

16 THE DEFENDANT: No objection.

17 MR. PELTZ: Your Honor, I do wish to make a  
18 motion before we proceed to sentence. May I, your  
19 Honor?

20 THE COURT: Yes sir.

21 MR. PELTZ: Your Honor, at the time of verdict,  
22 of conviction, the Court granted the defense until the  
23 time of sentence to make motions.

24 I would respectfully move pursuant to rule 29  
25 for a judgment of acquittal.

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1 THE COURT: Without formal argument?

2 MR. PELTZ: I was saving my argument for a rule  
3 33 motion.

4 THE COURT: Well, your motion for post judgment  
5 for acquittal is denied.

6 MR. PELTZ: I respectfully accept to your Honor's  
7 ruling.

8 With respect to rule 33 I am now making a motion  
9 for a new trial. I am respectfully submitting to your  
10 Honor that there was an error of sufficient magnitude  
11 that will result in the granting of a new trial on an  
12 appeal. I would implore your Honor to authorize a new  
13 trial pursuant to the rule for granting a new trial,  
14 at this time. And I am submitting to your Honor, that  
15 admitting the rebuttal evidence tendered by the  
16 Government in the form of a protracted statement or  
17 confession by the defendant was a gross error, in that  
18 it violated the exception to Miranda against Arizona  
19 as carved out in Harris against New York.

20 It was made clear that such a statement was  
21 admissible only for the purpose of impeaching the  
22 testimony of the testifying defendant.

23 That evidence on rebuttal in this case came as  
24 evidence in chief.

25 That was not admissible. And it was such a

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10

1 violation of this defendant's constitutional privilege  
2 and existing case as it will mandate a new trial on  
3 appeal.

4 For that reason I would respectfully suggest to  
5 your Honor that a new trial is permissible under  
6 rule 33.

7 MR. WOODFIELD: Your Honor, do you wish to hear  
8 from the Government at all.

9 THE COURT: Yes I do.

10 MR. WOODFIELD: There have been no papers  
11 submitted to the Government at all.

12 I haven't reviewed this, but I certainly will.

13 THE COURT: I will entertain an application on  
14 this point.

15 MR. WOODFIELD: I can only suggest to your  
16 Honor that the statements that were admitted that  
17 there was no ruling that these statements were not  
18 admissible by the Government. There was no suppression  
19 hearing as to those statements. And the Government  
20 didn't intend to use the statement in its direct case.

21 MR. PELTZ: Your Honor, they are not a proper  
22 rebuttal.

23 It would seem to me that the Government  
24 thought, that they conceded that this was not proper  
25 direct testimony.

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1 MR. WOODFIELD: No such conclusion was made.

2 THE COURT: There is no doubt in my mind that  
3 was not proper direct testimony.

4 As the man was fully warned of his rights, he  
5 said he made a tentative agreement, as I understand it  
6 with the agent in which he said, that he would  
7 cooperate and they said they wouldn't use the statement  
8 against him.

9 But then he broke his part of the agreement.  
10 So that at that point they were free to use it against  
11 him.

12 MR. PELTZ: The only part I have any problem  
13 with is whether it was proper to use it as rebuttal.

14 THE COURT: I thought it was proper rebuttal  
15 by a witness who was phony, and I think the jury  
16 agreed.

17 MR. PELTZ: Your Honor, I submit that it was  
18 not only improper rebuttal, but certainly improper in  
19 light of the respective agreement. This was a  
20 confession that was not supposed to be used.

21 THE COURT: Oh. If there was an agreement made  
22 between we two and you broke your part of it, then I  
23 would no longer be held to mine.

24 It was in return for his agreement to cooperate:  
25 I will not use any of your testimony if you

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1                   cooperate. That's right out of first grade law school  
2                   out of contracts.

3                   MR. PELTZ: That is.

4                   THE COURT: That is my understanding of the  
5                   transaction.

6                   MR. WOODFIELD: Whether or not it is proper  
7                   rebuttal for the Government is not an issue to be  
8                   raised here. It should have been raised during his  
9                   defense at trial. It should have been done by his own  
10                  defense witness by directly contradicting the  
11                  Government witness.

12                  I think that it was proper rebuttal. It was  
13                  in direct contradiction of the defendant's case.

14                  THE COURT: That's the way I see it. Unless  
15                  Harvin carves out something entirely different, which  
16                  if I read it, has gone out of my mind. Unless it  
17                  carves out some sort of exception as to this type of  
18                  rebuttal testimony, an exception which I am not  
19                  familiar with, I would think that the law is pretty  
20                  clear on this.

21                  MR. WOODFIELD: I haven't submitted any  
22                  authority on this.

23                  I am a little taken back with the suggestion  
24                  that it is not proper rebuttal evidence. It is what  
25                  those cases stand for.

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1                   MR. PELTZ: It is my interpretation of Harvin  
2                   that it doesn't deal with such a case. And it seems  
3                   to me that such a statement is not      admissible  
4                   evidence.

5                   THE COURT: Well, does Harvin involve two  
6                   parties and did one party welsh?

7                   MR. WOODFIELD: No.

8                   MR. PELTZ: I would most respectfully disagree  
9                   with your Honor that the facts are not being supported  
10                  by the evidence.

11                  THE COURT: Maybe I am getting deaf and dumb in  
12                  my old age, but that is the way I heard the testimony.  
13                  I think that is the Government's position.

14                  MR. WOODFIELD: Yes your Honor.

15                  THE COURT: If Harvin is on that point, I will  
16                  hold against it. I will be glad to read it if it is  
17                  on that point.

18                  But the way I see this whole thing, the way I  
19                  see this whole picture, if you want me to read the  
20                  Harvin case before sentencing this defendant, I will.

21                  I may have read this case but I have entirely  
22                  forgotten it.

23                  MR. PELTZ: I think that perhaps a re-reading  
24                  of this case might change your Honor's mind.

25                  MR. WOODFIELD: Your Honor, the statements were

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1           legal. The statements were taken in view of the  
2           defendant's Miranda rights. They were taken there  
3           after the defendant was given his rights. The officer  
4           told him that the statements could be used against him  
5           to impeach him if the defendant would ever take the  
6           witness stand.

7           MR. WOODFIELD: Your Honor, last week a case  
8           came down Hass I believe it was. I do think that it  
9           is important.

10          MR. PELTZ: Well, Judge, I believe you are  
11          aware of the fact that the Government represented to  
12          the defendant that they would not use the statements  
13          in the direct case.

14          THE COURT: They didn't. I think Mr. Woodfield  
15          would concede that. They didn't use them on the  
16          direct case.

17          MR. PELTZ: I submit to your Honor that these  
18          statements were obtained, by a result of a representa-  
19          tion made by an agent of the Government that this will  
20          not be used against you if you do not cooperate, but that  
21          this will not be used against you period. It was not  
22          qualified to if you cooperate it will not be used  
23          against you.

24          THE COURT: I had not viewed the evidence that  
25          way.

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15

1 MR. WOODFIELD: It is my recollection that Mr.  
2 Peltz has stated that incorrectly.

3 It was quite clear during the trial.

4 THE COURT: I had my antenna up for that very  
5 question so, it seems to me that it came out just that  
6 way. I may be wrong. But that is my recollection. I  
7 haven't really read the testimony of the trial.

8 Did you order the testimony of that last day.

9 MR. WOODFIELD: I believe your Honor, ordered the  
10 testimony.

11 MR. PELTZ: I didn't order the testimony. I  
12 will request it under the CJA. It was not ordered at  
13 trial.

14 THE COURT: It was not ordered at trial. If  
15 that is your argument I will have to deny your motion.

16 If you wish to submit any excerpts of the  
17 testimony which might help my recollection, I will take  
18 them into consideration before proceeding with the  
19 sentence.

20 I just have a very clear recollection of this  
21 agreement. That they shook hands on it and he walked  
22 out and he never came back. And I think that it is  
23 still in that posture. He has never come back. He is  
24 not willing to cooperate even today.

25 MR. PELTZ: Your Honor, the problem is that I

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16

1 would like to submit the testimony to you today. But  
2 the defendant does not have funds. The defendant has  
3 exhausted his financial means and has gone into heavy  
4 debt as a result of this trial. I was going to make  
5 an application for the transcript pursuant to the CJA.  
6 He has exhausted his financial means. It has become  
7 a legitimate problem trying to obtain the transcript.

8 THE COURT: I don't understand why. Does the  
9 Government have the entire testimony of the agent?  
10 Wasn't it ordered?

11 MR. WOODFIELD: No testimony was ever ordered.

12 THE COURT: I don't remember seeing any  
13 testimony.

14 MR. WOODFIELD: No, it wasn't ordered daily  
15 copy, your Honor. I will order it since we have an  
16 appeal in issue.

17 THE COURT: Well, do you want to handle it?

18 MR. PELTZ: Well if your Honor wants to  
19 authorize the procurement of all of the testimony.

20 THE COURT: Let us order the testimony of the  
21 agent, of the Government agent. That is at the  
22 Government's expense without authorizing anything  
23 at this point other than the agent's testimony on  
24 rebuttal.

25 MR. PELTZ: I heard what your Honor said. I

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1 will order the agent's testimony on the rebuttal.

2 THE COURT: And I will look at it and see if it  
3 confirms my impression. My present recollection is  
4 that I made a decision on that basis. Perhaps that is  
5 the safest course possible to follow.

6 MR. WOODFIELD: Your Honor, this is the second  
7 delay of this sentence by Mr. Peltz. He has indicated  
8 that he is going to appeal. This is an issue that can  
9 be handled on appeal.

10 THE COURT: If Mr. Peltz says I am wrong on  
11 this particular point, then the Government would be  
12 going to pay the expense of an appeal and your reply  
13 and so forth on the appeal, perhaps we may be able to  
14 save some small expense for the Government if we just  
15 order this small portion of the record.

16 MR. PELTZ: I would ask your Honor that whatever  
17 your ruling is would you please read that testimony  
18 before you make it.

19 THE COURT: I think I will order the agent's  
20 testimony. It is about an hour's worth of testimony.  
21 I will put this on for June 20th. Submit this in  
22 writing Mr. Peltz.

23 MR. PELTZ: Your Honor do you wish me to give  
24 a copy of what I submit to you to Mr. Woodfield?

25 I would like to have a look at the record. If

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1 it doesn't bear me out I will submit the Harvin case.

2 MR. WOODFIELD: Would your Honor give Mr. Peltz  
3 a date to submit. I would like to have a copy of the  
4 case.

5 THE COURT: Yes I will say next Wednesday.

6 MR. PELTZ: Is this on for the 20th?

7 THE COURT: I will give you until next Thursday  
8 a week from today. If you wish me to look at any  
9 cases let me know by then.

10 MR. WOODFIELD: Thank you your Honor.

11 MR. WOODFIELD: I am going to submit by June  
12 12th.

13 MR. PELTZ: May I have a copy of the agent's  
14 testimony?

15 THE COURT: It would be unfair unless both of  
16 you would have a copy to look at. That would be the  
17 normal procedure. Let me take a look at it. I will  
18 let you know if I want you both to look at it.

19 MR. PELTZ: Thank you very much.

20 MR. WOODFIELD: Thank you very much, your  
21 Honor.

22 \* \* \* \* \*

23

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THE COURT: Mr. Peltz, the last time  
we were here you suggested that this -- these admissions  
that were made at the trial or admitted at the  
trial on rebuttal had been somehow in violation  
of your client's rights and as I indicated to  
you I didn't think so, but I ordered the record out  
of an excess of precaution, and I'm going to read  
to you from page 24 and page 25 of the cross-  
examination of Mr. De Graffio where at one point I  
guess I started to ask Mr. De Graffio certain  
questions.

12                   And I said "When you said, as I believe you  
13                   did on cross-examination at one point, that the  
14                   statements that he made, the further statements that  
15                   he made, were not going to used against him, was  
16                   that made in a context not going to be used  
17                   against him in this case or not going to be used  
18                   against him in building a larger case as you  
19                   heretofore indicated?

"THE WITNESS: I meant it that what he said

21 || --

24 "THE WITNESS: : The context that it was made  
25 that what he said would not be used against him to

1 Nussen

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2 develop an entire case or a larger case. It would  
3 not be used to drag in other narcotic transactions  
4 of other types of incidents that had occurred.

5 What we needed from him was an assurance that he  
6 in fact would help us to further this case to get  
7 to the source of supply.

8 "THE COURT: It was made in that context?

9 "THE WITNESS: That context."

10 Now, as I read that and as I read the  
11 surrounding parts of that testimony what Mr. De Graffio  
12 was saying was that he made no promise that he would  
13 not be prosecuted or that anything he said would  
14 not be used in connection with the case as to which  
15 they already had him, so to speak, but that they  
16 wouldn't use anything he said to add to that case  
17 against him in terms of building or adding additional  
18 counts in the indictment that they already envisaged  
19 and indeed they didn't, they only charged him with  
20 just one violation and they used -- and they  
21 warned him not once but twice.

22 MR. PELTZ: Your Honor, in so sensitive  
23 an area the statement made by the agent is significant  
24 not in what he intended but in what he said, so his  
25 description of the context by stating what was in

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? his mind.

3 THE COURT: No, I didn't -- that's why  
4 I specifically said I didn't care what was in his  
5 mind, I wanted to know the context in which it was  
made.

7 That was his testimony and it was his uncon-  
8 tradicted testimony.

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11  
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13  
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15

MR. PELTZ: Your Honor, I feel there was no testimony to the contrary in the trial. That's why I made the point, that's why I went back over the question and asked him I don't care what's in your mind. I want to know the context in which it was made and he gave me the context in which it was made, and it was just in the context that I just related to you.

17 THE COURT: Had there been some evidence to  
18 the contrary at some point that would have been one  
thing, but there wasn't.

20                   No, I think the point is abundantly clear  
21                   and that's why I found the way I did with respect  
22                   to the admission of that testimony. I was mindful  
23                   of the -- we had a preliminary hearing on his  
                     testimony and then we had his testimony at the trial.

MR. PEITZ: Judge, I don't have that

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2 transcript as you well know, and from my reading  
3 of the pertinent cases even as your Honor describes  
4 it, I would say applying the Casserino case,  
5 applying Shockwell, I would say that the defendants  
6 contention would be appropriate.

7 THE COURT: In no way. In no way. If a man  
8 can come in and confess his guilt and then if he  
9 is -- and then -- then the agent says would you be  
10 willing to cooperate with us and he says yes, and they  
11 say -- and he says all right, in connection with  
12 any such cooperation added to the indictment we have  
13 already got against you in effect, and -- but --  
14 will you -- if you will -- if you will tell us how  
15 to get to the source of supply and he says, Fine,  
16 I will tell you how, by doing that he doesn't give  
17 himself an immunity badge. That's what you're  
18 asking for and there is just no such law.

19 At least I know of none.

20 MR. PELTZ: I'm saying that the  
21 Government is bound by that agent's representation  
22 that those statements would not --

23 THE COURT: I say that is -- that is a wholly  
24 unreasonable concept of the law.

25 MR. PELTZ: Judge Platt, if we

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2            liken this to the process applied by the Government  
3            in this district where a man does seek to cooperate  
4            they will not even question him until they make  
5            |  
6            it clear not that what he says won't be used  
7            against him, but they indicate very clearly that  
              that which he says will be used against him.

12 MR. PEITZ: And --

13 THE COURT: Then he made certain statements  
14 that were against his interest and they said All  
15 right, in view of this now would you like to go  
16 further and anything further we won't use against  
you.

Now, that's a different animal than the one  
you represented to me on the last occasion. But any-  
way, I have made my ruling. I will not give you a  
new trial on that basis.

22 MR. PELTZ: Under those circumstances,  
23 your Honor, the defendant will be read for  
sentence.

THE COURT: All right, is there any reason

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2 why we shouldn't proceed with sentence, Mr. Nussen?

3 THE DEFENDANT: No, your Honor.

4 THE COURT: Do you want to say anything on  
5 his behalf, Mr. Peltz?

6 MR. PELTZ: Well, I have read the pre-  
7 sentence report. I have submitted a memorandum on  
8 behalf of the defendant for sentence which I hope  
9 your Honor has had occasion to read.

10 THE COURT: Yes, I have read it.

11 MR. PELTZ: There are significant  
12 letters appended to it. This is a young man who  
13 has, despite his youth, had a lot of hardship and a  
14 lot of tragedy. He has found an occupation, he's  
15 well received at work, he's youthful and important  
16 to his family, where we submitted to your Honor  
17 medical evidence of his mother's condition and of his  
18 help to his family, and I can ask that your Honor  
19 please be as lenient as you might in such a situation.

20 THE COURT: Do you wish to say anything,  
21 Mr. Nussen?

22 THE DEFENDANT: Yes.

23 As Mr. Peltz said, I have a good job and I'm  
24 happy with my work. My mother is proud of me and I'm  
25 proud of myself. I would like to continue my job and

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2 be myself and anything that does come before me I  
3 will certainly just plan on picking myself up and  
4 starting again if I have to. That's about all.

5 THE COURT: Well, the Court heard all of the  
6 evidence in this case and the Court is aware of  
7 the -- all the facts, and it is a drug case as we  
8 both know.

9 It's the judgment of the Court that the Court  
10 finds the defendant was 22 years of age at the date  
11 of conviction and is suitable for handling under  
12 the Federal Youth Correction Act as a young adult  
13 offender, 4209.

14 It is adjudged under Count three of the  
15 indictment that the defendant is hereby committed  
16 to the custody of the Attorney General or his  
17 authorized representative for treatment and  
18 supervision pursuant to 18-U.S.C. Section 5010B  
19 until discharged by the Federal Youth Correction  
20 Division and the Board of Parole as provided in  
21 Section 5017C.

22 Now, you have the right to appeal, Mr. Nussen,  
23 from your conviction. If you can't afford counsel  
24 you can file an affidavit to such effect under the  
25 CJA and the Court will appoint counsel for you.

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2 Does he intend to do so, Mr. Peltz?

3 MR. PELTZ: Yes, your Honor.

4 THE COURT: You will not be entitled to have  
5 Mr. Peltz as your attorney under the circumstances,  
6 you recognize that, it will be a court -- I mean  
7 unless you have the luck of the draw, so to speak,  
8 you will have Court-appointed counsel.

9 THE DEFENDANT: I understand.

10 THE COURT: Have you filed such an affidavit?

11 MR. PELTZ: Your Honor, the deputy gave it  
12 me this morning and we haven't yet completed it.

13 THE COURT: I will check it if you file it  
14 before you leave here.

15 MR. PELTZ: I certainly will, your Honor.

16 THE COURT: Wait a moment, now. In your  
17 opinion does his financial status warrant appointment  
18 of counsel?

19 MR. PELTZ: From what I am informed, your  
20 Honor, this young man is in debt. He owes his  
21 employer probably his next half year's earnings in  
22 connection with the expenses of the trial completed  
23 before you and from what I have been told by him and  
24 his employer I think he will qualify under CJA.

25 THE COURT: Are you going to file a notice

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1                   of appeal for him?

2                   MR. PELTZ: I certainly will, sir.

3                   THE COURT: This morning?

4                   MR. PELTZ: In which case I will file it this  
5                   morning.

6                   THE COURT: I will check it, yes.

7                   Then if you don't, your client will be  
8                   prejudiced, you understand that?

9                   MR. PELTZ: I will file it.

10                  THE COURT: All right, we'll hold this until  
11                  these things have been done.

12                  MR. PELTZ: Sir, I will do that this  
13                  morning. I have one matter with Judge Bramwell.

14                  THE COURT: What's the bail here?

15                  MR. WOODFIELD: The bail is presently \$5,000.  
16                  PRB is imposed. The Government wouldn't object to  
17                  continuing that, your Honor.

18                  THE COURT: All right, the bail will be con-  
19                  tinued pending appeal.

20                  MR. PELTZ: Your Honor, I will go to Judge  
21                  Bramwell then come back with these completed forms.

22   \*

23   \*

24   \*

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United States of America vs.

DEFENDANT

MILTON NUSSEN

United States District Court for

Eastern District of New York

M FILMED

DOCKET NO. ➤

74 CR 784

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government  
the defendant appeared in person on this date

MONTH DAY YEAR  
6 20 1975

COUNSEL

WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

WITH COUNSEL

Philip Leltz, Esq.

(Name of counsel)

FILED

IN CLERK'S OFFICE

146, DISTRICT COURT OF NEW YORK



PLEA

GUILTY, and the court being satisfied that  
there is a factual basis for the plea,

NOLO CONTENDERE

JUN 20 1975

FINDING &  
JUDGMENT

There being a finding/verdict of

NOT GUILTY. Defendant is discharged

TIME A.M. ....

P.M. ....

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.C.Sec. 846,  
in that on or about and between July 1 and July 16, 1974, both dates  
being approximate and inclusive, the defendant, with others, did  
knowingly and intentionally conspire to commit offenses against the  
U.S. in violation of T-21, U.S.C.Sec.841(a)(1) by conspiring to  
intentionally possess with intent to distribute and to distribute a  
quantity of Phentermine, a Schedule III controlled substance

SENTENCE  
OR  
PROBATION  
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for treatment and supervision pursuant to Title 18, U.S.Code, for

treatment and supervision pursuant to Title 18, U.S.Code, Sec. 5010(b) until discharged by the Federal Youth Correction Division of the Board of Parole as provided in Title 18, U.S.Code, Sec.5017(c)

SPECIAL  
CONDITIONS  
OF  
PROBATION

ADDITIONAL  
CONDITIONS  
OF  
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

COMMITMENT  
RECOMMEN-  
DATION

SIGNED BY

U.S. District Judge

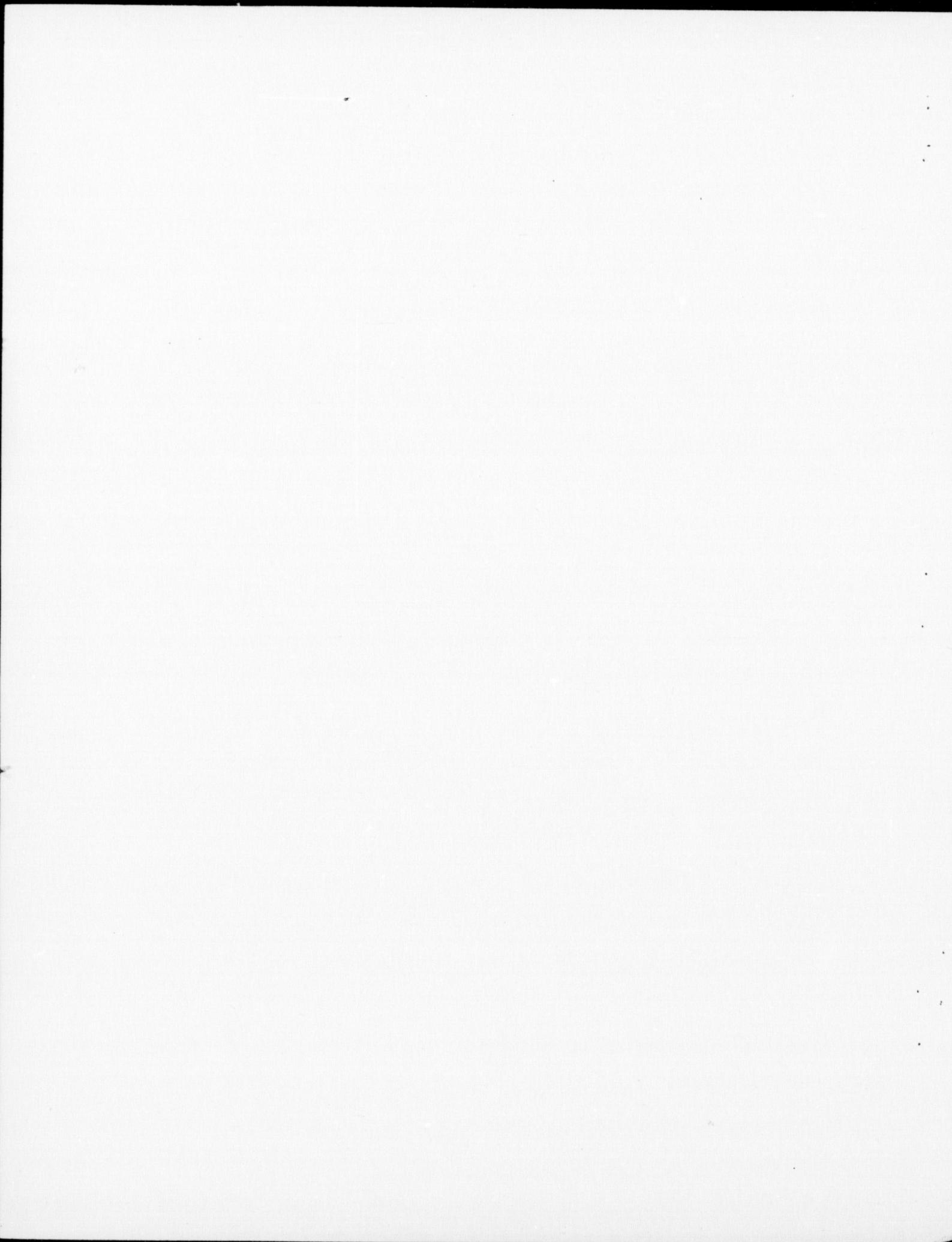
U.S. Magistrate

Thomas C. Blatt

Date

9

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28  
344-1972  
E. C. R. S.  
~~Long Island~~  
~~Long Island~~